

# Practicing and Professing Spirit in Law

by Emily Fowler Hartigan\*

Both my faith life and my professional life are located in the center of my scholarship. During the eight years of my law practice, I realized the necessity of my relationship with God and my faith communities, for maintaining balance. There was for me an aspect of sheer survival as a sane human being, in my deepening pursuit of my spiritual life even as my litigation experience grew. So when I subsequently began to write in legal journals, I already had claimed the role of faith in the "public" sphere, as key to my intellectual concerns.

After all, it was theologians and mystics I found myself reading in the midst of battery trials; it was Thomas Merton, Juliana of Norwich, and John Woolman (an American Quaker abolitionist and mystic) who kept me from being pulled down by the steep emotional—almost physiological—dynamics of litigation. At the same time, the public role of spirit in American politics and discourse compelled my reflective work and scholarly reading.

My own "personal" journey underlay my professional changes. I found that in practice I had needed liturgy and books that my first husband nervously called "devotional reading", to keep balanced . . . and that semiconscious balancing strategy led me to a fascination with the disappearance of open devotion to God, a retreat that intellectual history attributed to the Enlightenment.<sup>1</sup> I wanted to know more about the origins and nature of the "death of God"; eventually, I was led to conclude that S/He was not dead so much as resurrected. I tried to write to that effect; I got the strangest reactions. Such public witness as mine is located somewhere in the space outside the usual North American political spectrum, because capitalist liberalism (philosophical, not Democrat-Republican) has no place for the holy. The philosophy of the "invisible hand" is too secular, too pragmatic, too competitive, too skeptical about values, to have any other invisible Being around.

In the academy, "Rationalism" did not include God as a legitimate "player" in its "pluralist" political calculus. Then Richard John Neuhaus, a neo-conservative philosophical liberal, wrote *The Naked Public Square* with both eloquence and erudition.<sup>2</sup> Neuhaus, arguing that we are left with

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1. See WILLIAM BARRETT, *THE DEATH OF THE SOUL* (1986).

2. RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE* (1984).

nothing to clothe our "public" discourse after the "new clothes" of the emperor secularism swept the square of old-time religion and morality, pointed a compelling finger at the vacuity of North American discourse. I was made hopeful when writers began to try to reintroduce religion in public; with positive expectations, I tried Michael Novak's *The Spirit of Democratic Capitalism*.<sup>3</sup>

It was awful. Novak made Jesus out to be a small-time entrepreneur.<sup>4</sup> He lauded competition and self-interest of the most secular kind, and left no reentry for the spirit except a pious wave toward a politics of "no one form of conscience." He was unable to reconcile the core paradox of our version of capitalism: self-interest as our public role leaves no public room in politics for what is manifestly not mere calculation of self-interest, that is, our relationship to God. The Spirit may be mysterious, but S/He is not a corporate CEO. If we could not come up with ideas of the person operating in the world of work who also was mindful of the primacy of God's creation, we were left with mercantile competition and some nontheistic invisible hand. There was no way to expect the public good to have any coherence at all. All Novak did in the end was to bless the existing distribution of wealth, affirm a spectral-but-not-spiritual "invisible hand" in the public square, and leave God sealed in the so-called private sphere.

This reiteration of the marginalization of God made me particularly aware of the fate God and women shared. The classic division between home and business, between the realm of "feminine" morality and love, and the realm of "tough" survival skills and competition, was powerfully parallel to the division between God and politics, between spirit and public discourse. Women and God were being kept in the same closet.

This left the public with little cause for hope for the public good besides a naive sense that the United States was superior to every other country in the world—and that was so transparently wrong that the reintroduction of God as a presence in our intellectual and public life seemed to me to be not only a way to my own faith life but also a political necessity.

Yet the cynicism born of historical reflection on the hypocracies of the religious, must be addressed. God has been used and abused, commercialized, advertised and not delivered. I remember one exit poll comment, reported back an election or so ago, to the effect that what the voter wanted was someone who really believed in God and who was unmanipulative enough not to have to talk about it. We in North America could not do God-talk in a way that intellectuals trusted it, and we could not

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3. MICHAEL NOVAK, *THE SPIRIT OF DEMOCRATIC CAPITALISM* (1982).

4. See Emily Albrink Fowler, *God and Mammon and Democratic Capitalism*, 62 TEXAS L. REV. 949, 959 (1984).

do it so the person on the street did, either. To that voter, politics and business had made God into just another symbol system to fabricate sound bytes; to the intellectual, the stirrings for God were the passions of the superstitious, tribal masses. The voters, smart enough to understand hypocrisy, were deemed by the elites to be too stupid not to want to impose their religious beliefs, whole hog, and directly on everyone else. What hope was there for a true revival of spirit in public?

Yet without a public conversation about God, how were we to learn Who God was becoming? In my tradition, the answer to Moses ("who shall I tell them has sent me?") was *ehyeh asher ehyeh*, which can be translated "I am becoming Who I am becoming."<sup>5</sup> Jesus kept asking who people said he was, and who his disciples said he was.<sup>6</sup> Without being recognized *in community*, Jesus would have been, after his ascension, like the proverbial tree falling in the deserted forest making no sound—nobody. Without memory and without a community of discourse, there is no way to sustain meaning or history. God in my tradition is a God of relation, whose third "person" is relation itself; the Holy Spirit is the love between Parent and Child. We make ourselves in our loving; we make God manifest in relationship. We are the stewards of God's story in time, of God's presence in the world. How could we do our part in the revival of a post-Enlightenment God, one who was timeless-in-history, ever the same always changing?

This question was not unlike the question in the strands of feminism that spoke to me: how can women become women, coequal for the first time in history? What would that look like, and how would it interact with the masculine itself changing in relation, as it must? How does a new figure make way in the dominant story, and when the old story of God ends in God's death, how do we begin stories of resurrection, reconstruction? I kept remembering Hannah Arendt's dictum that the only truly new thing was forgiveness.<sup>7</sup> The newness central to my tradition and to those I became enamored of like rabbinic Judaism, required both facing that there was something to forgive, and being willing to do so in right relation.

Now, this left me in an impossible position. I would go to feminist conferences and face the monumental hostility to religion because of its historical oppression of women; I would walk in religious intellectual circles and be nearly invisible because I was a woman. In legal scholarship, I was considered irrational and outside civil discourse when I spoke of Spirit. I was told point blank that I could not be a Catholic and a feminist; I was told that as a feminist I was not a true Catholic. I was told

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5. *Exodus* 3:13.

6. See *Mark* 8:27-29; *Luke* 9:18-20.

7. HANNA ARENDT, *THE HUMAN CONDITION* 236-43 (1958).

my writing was poetry, not legal scholarship. That barely touches what lack of legitimacy all this had in law. What did feminism have to do with law? And religion?! The kindest I received, by and large, was that my stuff was part of a fad. The least kind began with the accusation that my scholarship raised the sound of jackboots. Religious people were more arrogant than nonreligious, I was told. There was no stopping my nonreason from becoming fascism, or communism, or radical feminism, or hysteria.

A few colleagues kept telling me that the radically polarized response to my scholarship and teaching was a cause for celebration; these were the men who had pioneered the religious issues in legal scholarship, or ventured the "feminine" and nonrational realm of literature and law. Of course, they would admit, they already had tenure . . . .

I was a field unto my self. Feminist spirituality of law.<sup>8</sup> Amazed at the very idea, women in academic settings would ask whatever that could be? Real feminists were not in such a patriarchal field as law. There was no spirit to law. Law was not feminine. Spirit was not academic.

After a long sequence of academic institutional struggle—a struggle my spiritual direction companion (a Jesuit theologian) and my psychiatrist (a highly spiritual Catholic grandmother of many, mother of seven, whom I had not needed before my academic battles) called demonic—I was led mercifully to spend a year of true Sabbath. Through a friend on staff, I visited Pendle Hill, a Quaker center for contemplation and study adjacent to Swarthmore College where I had been an undergrad. All those years I was studying academic (highly analytic) philosophy, Quakers were walking the woods in prayer. Now I got to experience that strange, almost haunting, presence. I spent the year studying, living and working in community, going to silent worship daily and both Meeting and Mass on Sunday. I initially refused to take the courses in the classical canon (Oedipus and Lear, for example) because I could not imagine why I would want one more Euro-centric masculine set of scriptures, even though the teacher was my consultant and an amazingly gifted teacher.

I conversed and taught with Howard Lesnick, a seeker who had begun correspondence with me after hearing a talk I gave at the annual law professors' convention—I used there the first-person faith-based voice I could not help but speak. We taught a seminar on religious consciousness and law at Penn Law School, and he came (often with his remarkable wife Carolyn Schodt) to courses at Pendle Hill. I was still doing legal scholarship, but the proportion of my life was strongly reversed: mostly

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8. One fleeting exception was Ruth Colker's powerful meditation on her Buddhist spirituality and women's issues, *Feminism, Theology and Abortion: Toward Love, Compassion and Wisdom*, 77 CAL. L. REV. 1011 (1989).



prayer, play, worship, and scripture, with very little of the attempted integration of jurisprudence and spirit that had been my predominant milieu for five years in the academy. I was resting in God's care, and I was wrestling with God with no holds barred. Part of my rest-and-resistance was my fundamental openness to my consultant, whose spirituality was almost diametrically opposed to mine. He did emptying; I was into claiming. He was outrageously humble (so much so you couldn't even tell most of the time); I was mouthing off to God, but good. I said I intended to sit and pout with God, for the first time in my life. He supported that. We ended up participating in an unbelievable dance of feminine-masculine/assertion-acceptance/community-individual that in its context was central to an upheaval of Spirit that the community recognized despite the outrageous costs. At the literal end of the year, during the day of, and the second key presentation on, the feminine of God, lightning shattered a huge tree fifty feet from where most of the members of the community were gathered. No one doubted that it was momentous, though no single interpretation reigned.

That is still mystery. I do not yet have words for it fully, though I begin to sense some of them. It had to do with sign, and with love, and with the incredible tension of this world still birthing in God's unfolding abundance. It was something about the One who made a universe with Laws, yet laws that are beyond our ken as mere rules. It is about the glory of Torah, and the power of God's majesty-and-humility. I really cannot tell you in easy terms what it meant, but I begin as best I can.

In early "classical" times, there was a foundational story of law. Aeschylus wrote a trilogy called *The Oresteia*,<sup>9</sup> which was subsequently interpreted as the birth of our legal systems.<sup>10</sup> When the Furies wanted revenge on Orestes for killing his mother, Athena set up the first jury trial, and when the jury tied, she let Orestes go. Then Athena sweet-talked the Furies into being the "kindly ones," the Eumenides, and everyone was happy that blood feud had ended, to be replaced by the reason of law. There are many problems with this story—Frederick Engels concluded it was the foundation of the patriarchy<sup>11</sup>—but central to the story's flaw is that the Furies were set up and then given a role that has since been violated. Aeschylus knew that no political order would survive without the cooperation of the wild feminine, the emotional, the fiercely loyal. But he

9. AESCHYLUS, *THE ORESTEIA* (Simon Goldhill trans., 1992).

10. See Paul Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043 (1988).

11. FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 76 (Int'l Publishers Co. 1972)(1942).

had Athena promise the Furies a role of profound honor, a role of acknowledged indispensability to the polis. And we have forgotten those Daughters of the Night who go underground at the end of the trilogy. We have neither honored them, nor have we known how to recognize them, as *necessary* to civilization.

Similarly, we have not known what to do with the feminine face of God. Although my own tradition kept Mary at the level of the divine functionally, doctrinally women were subjugated. We cannot be priests because without male gonads we are not in Christ's image. This truly bizarre closeting of God's mysterious multiplicity-in-unity has led to a Church hierarchy that is reminiscent of North American law. It is patriarchal, hypocritical, self-wounding, and no longer fully legitimate. Few believe in the government, and few believe in the curia who run the Vatican. We do not know how to discern between right ordering and right chaos, in our politics or in our churches. At the same time, our communities of faith are blossoming in unpredictable ways and our sense of public urgency is coalescing in unexpected places. We know our nation has goodness and that the Pope has holiness, yet both are changing—cracks appear in the symbols like the lines on a lovely egg becoming to-be-left-behind pieces of shell. We are dying and birthing.

In these deeply disturbing, even shattering transitions, I believe that law is one of God's gifts to us, that the Ten Commandments are part of God's attempt to help us know who we are so that we can be loved and love, and that in the final say government can be just a little bit more about self-conscious attempts to be just, than about dominance. I believe and pray that the emergence of the feminine into public and the corresponding reformation of the masculine, will help transform a politics that is mired in old confrontational categories. I believe there is evil AND that all things turn to the good, because I believe that all love God.<sup>12</sup> We love not because we are so smart (though we were interesting enough to create) but because God loved us first, and we respond. We have choice, and some of our responses are called atheism, some called secularism, some called fundamentalism, some called new names. But God has called us each by name, and "Christ", like the Tetragrammaton, is an ultimately unknowable Name, rather than the marker for a denomination.

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12. As I have indicated, that does not mean all call God by the same name, or know to use a name at all.

Integral to this both/and approach is an acceptance that, as Jewish theologian Lawrence Kushner puts it, the Garden of Eden was a set-up.<sup>13</sup> The serpent was made by God AND let into the garden, just in time to discuss the tantalizing "you can eat anywhere but not THIS one . . . ." tree. There is something about the move out of Eden that is, as Kushner affirms, like the move to adulthood. We are no longer infants in relation to God, but called to live our lives in God's image, and to wrestle with God (that is what Israel means: the one who struggles with God) as part of loving relation. So as serpents are to be re-examined, so are those who took serpents as symbolic of their power (early Goddess worshipers) and those who look to resurrect a renewed feminine. The risk is that this new feminine will be seen only in the Medusa guise, only as the implacable, duplicitous, avenging, bloodthirsty Fury. To acknowledge only the lethal Medusa would be to deny the goodness of the fidelity that the Furies embodied, and to attempt to live without their blessing on the household and the city that Aeschylus admits is necessary for human communities to flourish. We cannot live fully without these Furies, Athena admits, and we today must reconstitute that admission. That means many things, and one is that the old smarmy VirginMary<sup>14</sup> is not sufficient to give account of the power and mystery of the divine feminine. There is more than one Mary, and she is visible as, among other figures, the Dark Madonna and the Mary who is not so domesticated within the dominant culture as the "lovely Lady dressed in blue" of my grade school days. There is also the feminine figure of Sophia, of holy Wisdom. Just as the Furies have been seen as pure abomination, so did Hagia Sophia ("Holy Wisdom" in Greek) become "hag" and turn into the hatred of older, wise, perhaps impudent women. My call is to reintroduce the hag into law, to bring to honor a sacred wisdom not confined by the old male figures, to help us in the potential morass of multiculturalism. In Her simple form, this feminine aspect of God is the Holy Spirit in my tradition and the Shekhina in Judaism—an abiding, comforting presence, an Advocate for us all.

Even when I speak about the feminine in God, even raising specters of serpents and Furies, I do get response beyond the negative. Even some academics respond with personal stories, with poetry, with passion. Perhaps even more comforting to me are the practitioners. At a recent

13. LAWRENCE KUSHNER, GOD WAS IN THIS PLACE AND I, I DID NOT KNOW 73 (1991). To be honest, I had said the same before, but he gives me a theologically respectable citation (and used the same colloquialism).

14. The use of this as one word comes from the wonderfully funny meditation on the inevitable cliché used for women married to sports figures ("lovelywife") in law professor Terry Phelps' *Coach's Wife* (1994), the story of life with her husband "Digger" at Notre Dame.

conference at a Texas law school, I spoke directly about the dilemma of speaking from a faith perspective, especially in light of the rule-oriented sense of ethics and the calls by notable political thinkers like John Rawls to limit religious speech.<sup>15</sup> No one asked me any questions after my paper, a not-infrequent pattern, one always followed by intense PRIVATE affirmations of my enterprise. But one practitioner, whose paper was next, spoke directly "outside the script" to mention the need for space and time for reflection in ethical dilemmas, time to listen to God, he said. I thanked him afterward, and he said that at first he thought, as I talked "This is really politically incorrect!" Then he thought "If she isn't supposed to be talking this way, what am I doing here?" His faith told him immediately that such talk HAD to be acceptable, for the forum to be acceptable for him. So he, too, spoke of God.

Of course, he has not been as schooled in the depth of the taboo against religious speech in public, in the academy. Sandy Levinson of the University of Texas Law School noted a couple of years ago that only a handful of openly professing Christians survived in the elite law schools, so strong was the onus against religion.<sup>16</sup> When I was teaching at Penn, one of my favorite atheist colleagues said that he had noted and begun a campaign to change the fact that in his school, located in a city sixty percent Catholic, there was not one tenure-track Catholic on the faculty. The dismissals of religious talk that I have heard at the national convention of law professors range from the supercilious to the irrationally hostile.

Still, there are those of us who continue in this "uncivil" vein, because we cannot speak truly without also uttering our faith. The more I do it, the easier it does not become—but the more worthwhile, the more integral, and the more redolent with the Spirit. Those who have ears to, hear, and it is an incredibly blessed conversation.

Perhaps the most unexpected aspect of my faith in interaction with my profession has been the uncanny intersection of practice with my theory. I do theological, philosophical, narrative stuff, sometimes called by friends "la-de-dah theory" even when it is intensely poetic and personal. But I had not anticipated the way in which the causal arrows might become reversed, like a deconstructed logic of a Trickster God. Instead of just

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15. See, e.g., Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993); David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 506-07 (1994); David A.J. Richards, *Public Reason and Abolitionist Dissent*, 69 CHI.-KENT L. REV. 787, 838 (1994).

16. AALS Annual Convention, panel on Law and Religion, January 1993 (tape available from American Association of Law Schools).



trying to "walk my talk" and hoping it was sufficiently authentic, faithful, I found that the comic eschatology that theologians like John Dominic Crossan attributes to Jesus and Borges invaded my life.<sup>17</sup>

I had been teaching at Penn, and working in Camden with the social justice ministry of a mixed parish led by a priest once part of the "Camden Seven" with Daniel Berrigan. I hoped to move into that blighted neighborhood, with friends in community, and teach part-time. I got an offer in the Religious Studies department (which had, for the moment, escaped the destruction Penn originally planned for it) that was wonderfully consonant with my intellectual interests. But my fiancé from Pendle Hill days wanted me to consider his home state, Texas, even as he explored Camden also. Very warily, I agreed to go visit. From friends and grace, the strongest leading came to the meeting with Barbara Aldave, dean at St. Mary's Law in San Antonio, and Professor Amy Kastely. At one point in our initial meeting over dinner, I feigned getting up and leaving, because it was literally too good to be true. Here were women dedicated to a vision of social justice radically akin to mine, and a dean who is a feminist Catholic with a sense of Gospel I could only rejoice in. Barbara had spoken a few months earlier at a conference of religiously affiliated law schools, and said the damndest things. In talking about critics of her administration, she asked rhetorically for whom was the school *named* after all?

Once we strip away the heavily romanticized tradition that surrounds what does *Mary* mean to us Catholics? In the early part of the [Greek scriptures], Mary is introduced as an unmarried, pregnant teenager. When last we hear of her, She is an old woman . . . a widow who looks to friends for sustenance and support. In between her major appearances, she has searched for shelter, fled from Persecution, and watched the execution of her son.<sup>18</sup>

That is why, Aldave said, the clinics she had established were so appropriate: immigration, poverty, criminal defense, capital punishment clinics. The mission of this Catholic law school is to the *anawim*, the poor, forsaken and oppressed. Led by a woman dedicated to social justice, feminism, the Spirit, I cannot imagine a better home for my profession than

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17. JOHN DOMINIC CROSSAN, RAID ON THE ARTICULATE: COMIC ESCHATOLOGY IN JESUS AND BORGES 173, 178 (1976).

18. Barbara Bader Aldave, *The Reality of a Catholic Law School*, 78 MARQ. L. REV. 291, 295 (1995).

here in the Borderlands, at the margin, among the Others, in a faculty building constantly blessed by the liturgies our resident Sister Grace gathers periodically. When I exchange the blessing of ashes with the Tejano whose office is next door, when I listen to students who ask how they can keep their faith alive in, of all places, law school, when I move in community with fellow heretics and deeply thoughtful (even spiritual) atheists, I have reason to hope, and to affirm one of the teachings of my Church: that the reign of God is already present in mystery.<sup>19</sup>

One of the mysterious faces of that reign, for me, is that I have landed in, as a Lutheran friend noted, the only law school named after a woman saint (Mary is more than a saint, but the sentiment is correct). At St. Mary's, the reality of the feminine divine is increasingly visible, audible. Owned by the Marianists (unlike, for a wild example, Notre Dame, which is typical of "Catholic" institutions that transferred ownership for pragmatic reasons), staffed by many Marianists, and self-conscious about its Catholic and Marianist heritage, St. Mary's is nested in an environment that it honors. Although the law student population is in the process of change, the undergraduate demographics reflect San Antonio. We are about sixty percent Chicano, about thirty percent Anglo. The law school faculty has dramatically increased the Chicano faculty, also adding women and African-Americans in heartening numbers and for the right reasons. There is a genuine concern for community, evidenced by such things as the yearly Convocation at which faculty sit with staff and physical plant workers, and all are given voice. Our president, a remarkably patient Marianist priest, cherishes our controversial feminist dean, and speaks out in the very language that is so difficult for the rest of us, for our society:

The Catholics among us are called as well to an active role in the dialogue between the Gospel and the culture. . . . Religious diversity is part of our cultural setting and the dialogue between Gospel and culture needs that presence of active voices that can represent other readings of the Gospel and other experiences and expressions of faith in our cultures. . . . I think there is a great secret here, secret in the sense that we never talk about it, seldom even think about it, and will probably feel a little embarrassed to hear me talk about it this morning. But the fact is, no religious order was founded *primarily* to run schools, or hospitals, or to work with the poor, or to do any specific good work. All of them were founded, Marianists included, for one purpose: to participate in God's work of redeeming the world.<sup>20</sup>

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19. JOHN XXIII, GAUDIUM ET SPES ¶ 39 (1965).

20. John Moder, S.M., The Deeper Marianist Intentions at St. Mary's University, Address at St. Mary's University's convocation—Feast of the Assumption (August 15, 1995)(on file with author).

Somehow, after my struggles simply to survive and do my called work in the world, I have found myself at the most appropriate law school in the world, for me. Thus I must acknowledge openly that the God of the Unexpected, has outwitted me once again.